

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In re Petition of)
)
BEEHIVE TELEPHONE CO., INC.)
and BEEHIVE TELEPHONE CO.)
INC. NEVADA)
)
For a Declaratory Ruling that the)
Commission Does Not Entertain Actions)
by Incumbent Local Exchange Carriers to)
Recover Their Tariffed Access Charges)
from Interexchange Carriers)

To: Chief, Wireline Competition Bureau

PETITION FOR DECLARATORY RULING

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SUMMARY

Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada (collectively “Beehive”) request that the Commission issue a declaratory ruling that it will not entertain their complaint to recover unpaid tariffed charges from Sprint Communications Company, L.P. (“Sprint”) for interstate switched access service. Such a ruling would be based on the following: (1) an alleged failure of an interexchange carrier (“IXC”) to pay interstate access charges under a federal tariff does not state a cause of action under the Communications Act of 1934, as amended (“Act”); (2) a local exchange carrier (“LEC”) cannot bring a complaint under § 208(a) of the Act against an IXC in its capacity as a customer; and (3) the Commission is without authority to act as a collection agent for a LEC with respect to unpaid tariffed access charges.

The Commission may also exercise its discretion to issue a broader ruling that would remove the uncertainty exhibited by various federal appeals courts regarding the scope of the election-of-remedies provision of § 207 of the Act. It may clarify that (1) only a claim for damages caused by a carrier’s violation of a provision of the Act can trigger an election of remedies under § 207; and (2) a carrier’s failure to pay tariffed charges would give rise to a complaint for damages under §§ 207 or 208(a) of the Act only if the failure to pay violates a provision of the Act or a Commission rule, the violation of which also violates the Act.

Beehive asks the Commission to terminate a controversy that arises from the order of the United States District Court for the District of Utah, Central Division (“Court”) dismissing Beehive’s collection suit against Sprint without prejudice based on the Court’s finding that the suit was barred by § 207. The Court held that Beehive’s suit for the recovery of its access charges was barred because Beehive had filed an informal complaint with the Commission asking for a declaratory ruling that Sprint Nextel Corporation (“Sprint Nextel”) had engaged in

an unreasonable self-help practice by withholding payment of Beehive's access charges solely on the basis of an unadjudicated claim the Beehive was engaged in so-called "access stimulation."

The complaint provisions of §§ 206 through 209 of the Act make carriers liable for damages in proceedings before a federal district court or the Commission only to the person or persons injured by their acts or omissions that violate the Act. When construed in context, §§ 206 through 209 confer concurrent jurisdiction on the federal district courts and the Commission to hear complaints for the recovery of damages caused by such a violation.

Congress requires a person claiming to be damaged by a carrier to elect between making a complaint to the Commission under § 208(a) or bringing suit in federal district court under § 207, but the complainant cannot pursue both such remedies. Because the § 207 election of remedies is for the purpose of preventing duplicative adjudications and inconsistent results between the courts and the Commission, a § 207 election can be triggered only by duplicative claims for the recovery of damages suffered as a result of a carrier's violation of the Act.

The Act does not make a customer's failure to pay tariffed charges unlawful. Thus, a LEC's complaint that its IXC customer did not pay tariffed access charges does not constitute an allegation that the IXC in its role as a carrier, acted or failed to act in contravention of the Act. Hence, a LEC's allegation that its IXC customer failed to pay tariffed access charges does not state a cause of action under either § 207 or § 208(a).

It is self-evident that there can be no choice of forum or election of remedies under § 207 unless concurrent jurisdiction exists. Thus, there can be no bar to a district court complaint under § 207 if the Commission is without jurisdiction to entertain the complaint under § 208(a). And the Commission has repeatedly held that it is without jurisdiction to adjudicate a carrier's rights against its subscriber.

Because it is not empowered to act as a collection agent for carriers with respect to unpaid tariffed charges, the Commission has steadfastly refused to entertain such “collection actions” against subscribers under § 208(a). It has definitively held that an action for the recovery of unpaid access charges allegedly due under the terms of a federal tariff must be brought in federal district court. Consequently, it would be an exercise in futility for Beehive to recast its collection action as a § 208(a) complaint only to have it dismissed by the Commission for want of jurisdiction.

A declaratory ruling should be issued to alleviate the Court’s manifest uncertainty as to the jurisdictional issue and allow Beehive to proceed with its collection suit in what the Commission has identified as the proper forum for such actions. Because the Court’s dismissal of Beehive’s complaint might result in a § 415(a) statute-of-limitations bar to its right to collect its access charges, the Commission should expeditiously issue a brief declaratory ruling that it will not entertain a complaint by Beehive to recover access charges from Sprint. Such an abbreviated, non-controversial ruling should suffice, because Beehive’s collection suit could not trigger an election-of-forum under § 207 if the Commission is without jurisdiction to adjudicate Beehive’s claim. For the sake of expedition, the Commission may defer a ruling on the question of whether a LEC’s collection action against an IXC customer can be brought under § 207.

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Their Unpaid Tariffed Access Charges)
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PETITION FOR DECLARATORY RULING

Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada (collectively "Beehive"), by their attorney and pursuant to § 1.2 of the Commission's Rules and § 5(d) of the Administrative Procedure Act ("APA"), hereby request that the Commission issue a declaratory ruling terminating a controversy, or removing uncertainty, regarding whether it has jurisdiction over, or will otherwise entertain, a complaint by a local exchange carrier ("LEC") to recover unpaid tariffed access charges from its interexchange carrier ("IXC") customer. This controversy arises from the order of the United States District Court for the District of Utah, Central Division ("Court") dismissing Beehive's collection suit against Sprint Communications Company, L.P. ("Sprint") without prejudice based on the Court's finding that the suit was barred by § 207 of the Communications Act of 1934 ("Act"). *See Beehive Telephone Co., Inc. v. Sprint Communications Company, L.P.*, 2009 WL 3297303 (D. Utah Oct. 13, 2009), *motion for relief from order of dismissal denied*, 2010 WL 231776 (D. Utah Jan. 20, 2010).¹

¹ Copies of the Court's orders are attached hereto as Attachments 1 and 2.

FACTS

The following facts are not in dispute. Beehive is a LEC that provides interstate access service to IXC's and participates in NECA's access Tariff F.C.C. No. 5 ("NECA 5"). Believing that Beehive was engaged in so-called "access stimulation" in conjunction with conference calling companies,² Sprint Nextel Corporation ("Sprint Nextel") stopped paying Beehive's access service bills in October 2007.

Hoping to have the Market Disputes Resolution Division ("Division") of the Wireline Competition Bureau ("WCB") mediate its dispute with Sprint Nextel, Beehive filed an informal complaint with the Commission seeking a declaratory ruling that Sprint Nextel was obligated to pay Beehive's tariffed charges and that Sprint's self-help practice of withholding payment of those charges violated § 201(b) of the Act.³ The informal complaint alleged that Sprint Nextel unreasonably withheld payment of access charges that Beehive billed between October 1, 2007 and March 1, 2008.⁴ Beehive expressly requested mediation.⁵ With respect to the Commission's jurisdiction, Beehive stated:

Beehive recognizes that the Commission is disinclined to serve as a "collection agent" for carriers with respect to unpaid tariffed charges. * * * It is also aware that the Commission expects LECs to sue in state or federal courts to collect unpaid access charges. * * * Beehive has elected to do just that and is in the process of preparing the appropriate court papers.

² "Access stimulation" refers to arrangements under which chat lines, conference bridges, or other similar high call-volume operations are deployed in the service areas of rate-of-return and competitive LECs to increase switched access traffic. See *Establishing Just and Reasonable Rates for LECs*, 22 FCC Rcd 17989, 17994-95 (2007). The Commission is considering whether to adopt access stimulation rules to insure that tariffed rates remain just and reasonable even if a carrier experiences a significant increase in access demand. See *id.* at 17994.

³ See Letter from Russell D. Lukas to Alexander Starr, File No. EB-08-MDIC-0029, at 1, 8 (Mar. 21, 2008) ("Informal Compl.").

⁴ See *id.* at 5.

⁵ See *id.* at 8.

Beehive knows full well that courts often refer matters such as this to the Commission under the doctrine of primary jurisdiction. * * * In fact, a court has held that the Commission enjoys primary jurisdiction over a dispute involving unpaid access charges, especially when it was engaged in an ongoing rulemaking proceeding addressing issues that were virtually identical to those at issue in the dispute. * * * Beehive is asking the Commission to exercise its primary jurisdiction to obviate the need for a primary jurisdiction referral and to expedite the resolution of its dispute with Sprint.

The Commission entertains complaints for declaratory relief. * * * Beehive only seeks declaratory relief from the Commission. It does not allege, nor seek to recover, damages. Nor does it have to. * * * Therefore, § 207 of the Act does not apply and Beehive may prosecute this request for declaratory relief and a subsequent court action for damages.⁶

Sprint Nextel responded to Beehive's informal complaint for declaratory relief by arguing, first, that the Division should dismiss Beehive's informal complaint because it was "a holding company and does not provide telecommunications services."⁷ However, Sprint Nextel's primary argument was that the Commission lacked jurisdiction over the dispute, and that Beehive had to take the matter to court:

Beehive is asking the Commission to serve as its collection agent by declaring that either Sprint Nextel pay such charges or else be found to be in violation of Section 201(b) of the Act.

* * * * *

Beehive[']s argument that it is not asking the Commission to serve as its collection agent is absurd. * * * Were the Commission to issue Beehive's requested declaratory ruling ... Sprint Nextel would have little choice but to pay the outstanding charges if it were unsuccessful in challenging the Commission's ruling in the courts. Of course, as further explained below, the Commission lacks the statutory authority to entertain an action that involves a carrier's rights against one of its customers.⁸

Sprint Nextel's response to the informal complaint was based entirely on the FCC's lack

⁶ Informal Compl. at 6 (citations omitted).

⁷ Letter from Michael B. Fingerhut to Sandra Gray-Fields, File No. EB-08-MDIC-0029, at 1 n.1 (Apr. 30, 2008) ("Sprint Response").

⁸ *Id.* at 1-2.

of jurisdiction. It contended that: (a) § 201(b) did not give the FCC jurisdiction over the dispute;⁹ (b) the Commission does not have jurisdiction to adjudicate claims by carriers against their customers;¹⁰ and (c) Beehive must pursue its claims in court because the Commission is not authorized to act as a “collection agent” for carriers with respect to unpaid tariffed charges.¹¹ Sprint Nextel declined to participate in mediation before the Division.¹²

Beehive sued Sprint to recover \$929,626 in unpaid tariffed charges, plus interest and late fees.¹³ Its complaint alleged the Court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337.¹⁴ However, Beehive erroneously stated that the Court also had jurisdiction under § 207 of the Act.¹⁵

After Beehive filed its collection action with the Court, the Division notified Beehive that it was not recommending further action on Beehive’s informal complaint.¹⁶ The Division stated that, if Beehive was not satisfied by Sprint Nextel’s response to the informal complaint or the Division’s disposition of the matter, it could file a formal complaint under § 208 of the Act.¹⁷ Beehive did not pursue the matter further.

Sprint filed a motion asking the Court to dismiss Beehive’s complaint for want of subject

⁹ See Sprint Response at 2-4.

¹⁰ See *id.* at 4-6.

¹¹ See *id.* at 6-8.

¹² See *id.* at 7.

¹³ See Complaint, Case No. 2:08-CV-00380, at 5 (D. Utah May 13, 2008).

¹⁴ See *id.* at 2.

¹⁵ See *id.*

¹⁶ See Letter from Tracy Bridgham to Russell D. Lukas, File No. EB-08-MDIC-0029, at 1 (June 10, 2008).

¹⁷ See *id.*

matter jurisdiction.¹⁸ Sprint argued that Beehive claim was jurisdictionally barred by the election of remedies provision of § 207 of the Act, because Beehive's complaint before the Court "set forth the same facts and seeks the same relief" that Beehive sought by its informal complaint to the Commission.¹⁹ In response, Beehive pointed out that an election of remedies under § 207 only comes into play when there have been duplicative claims for damages and that its informal complaint to the Commission was for declaratory relief only.²⁰ It also argued that its claim against Sprint for \$929,626 in unpaid tariffed charges could not be barred under § 207, since the Commission lacked jurisdiction to decide Beehive's claim against its customer.²¹

The Court agreed with Sprint. Finding that the statute's text evinces a plain meaning, the Court held that Beehive made an election of remedies under § 207 by filing its informal complaint for declaratory relief from the Commission.²² With respect to Beehive's argument that the Commission lacked jurisdiction over its complaint for unpaid tariffed charges, the Court held:

This is a remarkable assertion from a party who repeatedly and categorically argued in its FCC complaint that the FCC possessed jurisdiction to resolve its claim against Sprint. Furthermore, the FCC never ruled on the issue of jurisdiction and even suggested that it has jurisdiction when it invited Beehive to file a formal complaint. Regardless, there is nothing in the record to suggest that the FCC determined that it lacked jurisdiction over Beehive's complaint against Sprint. As a result, it would be inappropriate and premature for this court to consider how the FCC's possible lack of jurisdiction over a claim may affect the operation of § 207 in the instant case.²³

¹⁸ See Sprint's Motion to Dismiss Beehive's Complaint Pursuant to Rule 12(b)(1), Case No. 2:08-CV-00380, at 2 (D. Utah May 13, 2008).

¹⁹ *Id.* at 2.

²⁰ See Plaintiffs' Response to Motion of Defendant to Dismiss Complaint, Case No. 2:08-CV-00380, at 9-12 (D. Utah May 13, 2008).

²¹ See *id.* at 12-17.

²² See *infra* Attachment 1 at 3-5 (*Beehive*, 2009 WL 3297303, at *2).

²³ *Id.* at 5 (*Beehive*, 2009 WL 3297303, at *3).

Beehive asked the Court to amend, or provide relief from, its order dismissing Beehive's complaint.²⁴ Among the relief it requested, Beehive asked the Court to reconsider its decision or, in the alternative, to refer to the Commission the question of whether it would have jurisdiction to decide a complaint by Beehive to recover its unpaid NECA 5 charges from Sprint.²⁵ On January 20, 2010, the Court issued an order by which it declined to reconsider the matter and denied Beehive's requests for relief.²⁶

Beehive sued Sprint again on January 25, 2010. It seeks to recover \$2,016,276.95 in unpaid access charges and late payment penalties billed to Sprint from April 1, 2008 to January 1, 2010.²⁷ Sprint's refusal to pay those NECA 5 charges was not the subject of Beehive's informal complaint to the Commission.

RELEVANT TITLE II PROVISIONS

This request for a ruling involves four consecutive provisions of Title II of the Act. The relevant portions of those provisions that are set forth below have remained unaltered since the Act was enacted in 1934.

§ 206. Carriers' liability for damages

In case any common carrier shall do ... any act ... *in this chapter prohibited or declared to be unlawful*, or shall omit to do any act ... *in this chapter required to be done*, such common carrier shall be liable to the person ... injured thereby for the full amount of damages sustained in consequence of any such *violation of the provisions of this chapter* ... to be fixed by the court in every case of recovery

....²⁸

²⁴ See Beehive's Motion to Amend, or Provide Relief from, Order of Dismissal, Case No. 2:08-CV-00380 (D. Utah Oct. 27, 2009).

²⁵ See *id.* at 3.

²⁶ See *infra* Attachment 2 at 5 (*Beehive*, 2010 WL 231776 at *3).

²⁷ See Complaint, Case No. 2:10-cv-00052, at 6-7 (D. Utah Jan. 25, 2010).

²⁸ 47 U.S.C. § 206 (emphasis added).

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring *suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter*, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.²⁹

§ 208. Complaints to Commission; investigations; duration of Investigation; appeal of order concluding investigation

(a) Any person ... complaining of anything done or omitted to be done by any common carrier subject to this chapter, in *contravention of the provisions thereof*, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time If such carrier ... shall not satisfy the complaint ... or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. *No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.*³⁰

§ 209. Orders for the payment of money

If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled³¹

ARGUMENT

I. ONLY A COMPLAINT FOR DAMAGES CAUSED BY A CARRIER'S VIOLATION OF THE ACT CAN TRIGGER AN ELECTION OF REMEDIES UNDER SECTION 207

- A. Sections 206 through 209 Confer Concurrent Jurisdiction on Federal District Courts and the Commission over Complaints for Damages Caused by Carrier Violations of the Act

²⁹ 47 U.S.C. § 207 (emphasis added).

³⁰ *Id.* § 208 (emphasis added).

³¹ *Id.* § 209.

Beehive will rely on two canons of construction. First, §§ 206, 207, 208 and 209 must be read in context, *see United States v. Balsys*, 524 U.S. 666, 673 (1998), “since the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hospital*, 502 U.S. 215, 221 (1991). Second, because § 207 of the Act confers jurisdiction on federal district courts, it must be “construed with precision and with fidelity to the terms by which Congress has expressed its wishes.” *Premiere Network Services, Inc. v. SBC Communications, Inc.*, 440 F.3d 683, 690 (5th Cir. 2006) (quoting *Palmore v. United States*, 411 U.S. 389, 396 (1973)).

In *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007), the Supreme Court addressed the issue of whether § 207 authorizes a suit for damages caused by the violation of a Commission rule that made the failure to pay compensation an “unjust and unreasonable” practice that would violate § 201(b) of the Act. The Court construed § 207 in context as follows:

Section 207 says that “[a]ny person claiming to be injured by any common carrier ... may bring suit” against the carrier “in any district court of the United States” for “recovery of the *damages* for which such common carrier *may be liable* under the provisions of this chapter.” * * * This language makes clear that the lawsuit is proper *if* the FCC could properly hold that a carrier’s failure to pay compensation is an “unreasonable practice” deemed “unlawful” under § 201(b). That is, because the immediately preceding section, § 206, says that a common carrier is “*liable*” for “*damages* sustained in consequence of” the carrier’s doing “*any act, matter, or thing in this chapter prohibited or declared to be unlawful.*”³²

The Fifth Circuit determined that only claims brought under the Act are subject to an election of remedies by construing § 207 in context with § 208:

Section 207 provides that a complaint about a common carrier may be brought to the Commission “as hereinafter provided for;” section 208 states that such complaint must be for “*contravention of the provisions [of the Act].*” Section 207 also provides that suit may be filed in federal court against a common carrier for the recovery of damages “for which such common carrier may be liable

³²*Global Crossing*, 550 U.S. at 52-53 (emphasis in original).

*under the provisions of this chapter.”*³³

Any person “complaining of anything done or omitted to be done” by a carrier in contravention of the Act may file a complaint with the Commission under § 208(a) of the Act. 47 U.S.C. § 208(a). In a § 208 complaint proceeding, a carrier is subject to “liability to the complainant only for the particular violation of law ... complained of.” *Id.* Upon finding that a complainant is entitled to an award of damages under the provisions of the Act, the Commission is authorized by § 209 to order the carrier to pay the complainant the sum of money to which it is entitled. *See id.* § 209. Thus, when read in context, the language of § 207 that refers to a complaint to the Commission “as hereinafter provided for” means a § 208(a) complaint to recover money damages caused by a carrier’s violation of the Act.

The complaint provisions of §§ 206 through 209 make carriers liable for damages in proceedings before a federal district court or the Commission only to “the person or persons injured” by their acts or omissions that violate the Act. 47 U.S.C. § 206. *See Illinois Bell Telephone Co. v. AT&T Co.*, 4 FCC Rcd 5268, 5269-70, *reconsideration denied*, 4 FCC Rcd 7759 (1989). When construed in context, §§ 206 through 209 confer concurrent jurisdiction on the federal district courts and the Commission to hear “complaints for damages for violation of the ... Act by carriers.” *AT&T Corp. v. Bell Atlantic – Pennsylvania*, 14 FCC Rcd 556, 561 (1998). *See In re Long Distance Telecommunications Litigation*, 612 F. Supp. 892, 899 (E.D. Mich. 1985) (§ 207 “merely outlines the concurrent jurisdiction of the FCC and federal district courts to hear claims of plaintiffs that defendants have violated other provisions of the [A]ct”). When its language is read precisely so as “to avoid expanding federal court jurisdiction,” *Premiere*, 440 F.3d at 690, § 207 confers district court jurisdiction *only* to entertain suits “for

³³ *Premiere*, 440 F.3d at 692 n.13 (citations omitted) (emphasis in original).

damages resulting from a common carrier's violation of specific provisions of the Act." *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 489 (2d Cir. 1968). *See Nordlicht v. New York Telephone Co.*, 799 F.2d 859, 862 (2d Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987) (jurisdiction did not lie under § 207 because plaintiff did not allege a violation of a specific provision of the Act).

B. A Carrier's Complaint that Its Customer Has Not Paid
Tariffed Charges Is Not Subject to the Jurisdiction of
a Court under § 207 or the Commission under § 208(a)

The Act does not make a customer's failure to pay tariffed charges unlawful.³⁴ Thus, a LEC's complaint that its IXC customer did not pay tariffed access charges does not constitute an allegation that the IXC "in its role as a carrier, acted or failed to act in contravention of the ... Act." *Illinois Bell*, 4 FCC Rcd at 5270. Hence, a LEC's allegation that its IXC customer failed to pay a lawful, tariffed access charges does not "state a cause of action under the complaint procedures." *Id.* Consequently, the Commission will not entertain a § 208(a) complaint filed by a LEC against its IXC customer to recover unpaid tariffed access charges. *See id.*

Because only complaints for damages caused by a carrier's violation of the Act can invoke a district court's original jurisdiction under § 207, and since the failure to pay tariffed charges is not a violation of the Act, a carrier's suit to collect its charges cannot be brought in federal district court under § 207. Such a collection suit is subject to a district court's jurisdiction under 28 U.S.C. §§ 1331 and 1337.³⁵ Therefore, a carrier's action to collect unpaid

³⁴ Section 203 of the Act prohibits a carrier from charging its customer other than its tariffed rates for telecommunications service, *see* 47 U.S.C. § 203(c)(1), and subjects the carrier to a forfeiture for violating the prohibition. *See id.* § 203(e). But a customer's refusal to pay the carrier's tariffed charges for the service is not "prohibited or declared to be unlawful" by any provision of the Act. *Id.* § 206.

³⁵ Five circuit courts of appeals have expressly held that district courts have subject matter jurisdiction over suits by carriers to recover unpaid charges under FCC tariffs. *See AT&T Co. v.*

tariffed charges cannot be brought either in a district court under § 207 or to the Commission under § 208(a).

C. Only Duplicative Claims for Damages Caused by a Carrier's Violation of the Act Are Subject to a § 207 Election of Remedies

Section 207 of the Act expressly provides for the “[r]ecovery of damages” for which a subject carrier may be liable under the Act. 47 U.S.C. § 207. Congress requires a “person claiming to be damaged” by a carrier to elect between making a complaint to the Commission under § 208(a) of the Act or bringing suit in federal district court under § 207, “but such person shall not have the right to pursue both such remedies.” *Id.* Because the § 207 election of remedies is for the purpose of preventing “duplicative adjudications and inconsistent results” between the courts and the Commission, *Premiere*, 440 F.3d at 688 (quoting *Bell Atlantic Corp. v. MFS Communications Co.*, 901 F. Supp. 835, 852 (D. Del. 1995)), a § 207 election can be triggered only by duplicative claims for the recovery of damages suffered as a result of a carrier’s violation of the Act. Like most courts,³⁶ the Commission interprets § 207 as applying to

City of New York, 83 F.3d 549, 552 (2d Cir. 1996); *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3rd Cir. 1995); *Western Union International, Inc. v. Data Development, Inc.*, 41 F.3d 1494, 1496-97 (11th Cir. 1995); *MCI Telecommunications Corp. v. Graham*, 7 F.3d 477, 479-80 (6th Cir. 1993); *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387-88 (8th Cir. 1992). The Sixth Circuit simply found that a claim for unpaid tariffed charges arises under federal law. *See Graham*, 7 F.3d at 479. The Second and Eighth Circuits held that jurisdiction over such claims is conferred by 28 U.S.C. § 1337. *See AT&T*, 83 F.3d at 552; *Garden State*, 981 F.2d at 388. The Eleventh Circuit found jurisdiction in both 28 U.S.C. § 1331 and § 1337. *See Western Union*, 41 F.3d at 1497. Finally, the Third Circuit found “no difference in these two bases of subject matter jurisdiction.” *Teleconcepts*, 71 F.3d at 1094 n.4. No court found its jurisdiction to entertain suits to collect tariffed charges in § 207 of the Act.

³⁶ District courts have held that only those claims and remedies sought by plaintiffs in their Commission complaints are barred from being in federal court. *See Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F. Supp. 2d 513, 552-53 (E.D. Tex. 2004); *Cancall PCS, LLC v. Omnipoint Corp.*, 2000 WL 272309, at *10 (S.D.N.Y. 2000); *RCA Global Communications, Inc. v. Western Union Telegraph Co.*, 521 F. Supp. 998, 1005-06 (S.D.N.Y. 1981).

duplicative claims for damages.³⁷ As one court put it, § 207 “clearly relates to a ‘suit for the recovery of damages’ ... and grants the aggrieved party the choice of administrative or judicial remedies for those damage claims.” *RCA Global*, 521 F. Supp. at 1005-06 (quoting 47 U.S.C. § 207).

It is noteworthy that the word “remedy” is defined as “the legal means of enforcing a right or redressing a wrong.”³⁸ A person damaged by a carrier has the right under § 207 of the Act to choose between two legal means to redress a wrong: file a complaint with a district court or the Commission. Under § 207, a federal district court can redress anything done by a carrier that is “prohibited or declared to be unlawful” by the Act. See 47 U.S.C. § 206. The wrong redressable by the Commission under § 208(a) is anything done by a carrier “in contravention of the provisions” of the Act. *Id.* § 208(a). Thus, the only wrong that is subject to redress under both § 207 and § 208(a) is a carrier’s violation of the Act. For there to be an election of remedies under § 207, the complainant first must seek the recovery of damages caused by such a violation.

II. THE COMMISSION LACKS JURISDICTION TO ENTERTAIN A CARRIER’S COMPLAINT FOR UNPAID TARIFFED CHARGES

“By its express language, § 207 establishes concurrent jurisdiction in the FCC and federal district courts only, leaving no room for adjudication in any other forum — be it state, tribal, or otherwise.” *AT&T Corp. v. Coer D’Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002). See *Telstar*

³⁷ See *Comsat Corp. v. Stratos Mobile Networks (USA), LLC*, 15 FCC Rcd 22338, 22350-51 (Enf. Bur. 2000), *review denied*, 16 FCC Rcd 5030 (2001); *Comsat Corp. v. IDB Mobile Communications, Inc.*, 15 FCC Rcd 7906, 7916-17 (Enf. Bur.), *review denied*, 15 FCC Rcd 14697 (2000); *Long Distance/USA, Inc. v. The Bell Telephone Co. of Pennsylvania*, 7 FCC Rcd 408, 410 n.30 (Com. Car. Bur. 1992), *review denied*, 10 FCC Rcd 1634 (1995), *reconsideration dismissed*, 11 FCC Rcd 1835 (1996); *Fairmont Telephone, Inc. v. Southern Bell Telephone & Telegraph Co.*, 53 Rad. Reg. 2d (P&F) 639, 642 (Com. Car. Bur. 1983).

³⁸ *Random House Webster’s Unabridged Dictionary* 1629 (2d ed. 2001). See *Black’s Law Dictionary* 1294 (6th ed. 1992) (defining “remedy” as the “means employed to enforce a right or redress an injury”).

Resource Group, Inc. v. MCI, Inc., 476 F. Supp. 2d 261, 271 (S.D.N.Y. 2007); *Vermont v. Oncor Communications, Inc.*, 166 F.R.D. 313, 319 (D. Vt. 1996); *Southwestern Bell Telephone Co. v. Allnet Communications Services*, 789 F. Supp. 302, 305 (E.D. Mo. 1992); *AT&T*, 14 FCC Rcd at 561. It “provides that the FCC and the district courts shall have concurrent jurisdiction but that the complainant is required to elect his forum.” *MCI Communications Corp. v. AT&T Co.*, 462 F. Supp. 1072, 1088 n.15 (N.D. Ill. 1978). And “the choice to proceed in one or the other available forum destroys jurisdiction in the remaining body.” *Bell Atlantic*, 901 F. Supp. 2d at 853. It is self-evident that there can be no choice of forum or election of remedies under § 207 unless concurrent jurisdiction exists. Thus, there can be no bar to a district court complaint under § 207 if the Commission is without jurisdiction to entertain the complaint under § 208(a). We will show that a carrier can never be barred from bringing a collection suit in district court because the Commission is without jurisdiction to determine a carrier’s right to collect unpaid tariffed charges.

A. The Commission Is Without Jurisdiction to
 Adjudicate a Carrier’s Rights Against Its Customer

Congress based §§ 206-209 of the Act on §§ 8, 9, 13 and 16 of the Interstate Commerce Act of 1887 (“ICA”). See Max D. Paglin, ed. *A Legislative History of the Communications Act of 1934* 37-38 (1989); *Global Crossing*, 550 U.S. at 49. Section 8 of the ICA was “asymmetric in the sense that, although the shipper or subscriber [could] seek recovery of damages from the carrier before the agency, the agency [was] given no authority to adjudicate claims by the carrier against its customer.” Paglin at 37. In *Laning-Harris Coal & Grain Co. v. St Louis & San Francisco Railway Co.*, 15 I.C.C. 37, 38 (1909), the Interstate Commerce Commission held that it was “not authorized to adjudicate the claim of a railroad company against a shipper, but only the claim of a shipper against a railroad company.”

Because the damages provisions of the Act were based on the ICA, the Review Board adopted the rule of *Lanning-Harris* in *Thornell Barnes v. Illinois Bell Telephone Co.*, 1 F.C.C. 2d 1247 (Rev. Bd. 1965). See *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1417-19 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1129 (1996). The Review Board held that the Commission was without jurisdiction to adjudicate “a carrier’s rights against a subscriber.” *Thornell Barnes*, 1 F.C.C. 2d at 1275. Following *Thornell Barnes*, the Commission has held that a LEC cannot bring a complaint against an IXC “in its capacity as a customer.” *Illinois Bell*, 4 FCC Rcd at 7760. See *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 599 n.240 (1998).

B. The Commission Has No Authority to Act as a Collection
Agent for Carriers with Respect to Unpaid Tariffed Charges

The complaint provisions of §§ 206 through 209 of the Act “make a carrier liable to its customers for any damages that result from the carrier’s unlawful actions or omissions.” *Illinois Bell*, 4 FCC Rcd at 5270. To allow a LEC to file a complaint against its IXC customer for unpaid tariffed access charges would “subvert [the statutory] design and turn the complaint procedures into a collection mechanism for the carriers.” *Id.* Because it is not empowered to “act as a collection agent for carriers with respect to unpaid tariffed charges,”³⁹ the Commission

³⁹ *Contel of the South, Inc. v. Operator Communications, Inc.*, 23 FCC Rcd 548, 556 (2008); *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826, 4835 n.58 (2005); *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552, 24555 (2004); *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, 7472 n.93 (2004); *Beehive Telephone Co., Inc. v. The Bell Operating Companies*, 10 FCC Rcd 10562, 10569 n.90 (1995); *Long Distance/USA*, 7 FCC Rcd at 412; *American Sharecom, Inc. v. The Mountain States Telephone and Telegraph Co.*, 8 FCC Rcd 6727, 6729 (Com. Car. Bur. 1993); *Long Distance/USA, Inc. v. The Bell Telephone Co. of Pennsylvania*, 7 FCC Rcd 408, 412 (Com. Car. Bur. 1992), *review denied*, 10 FCC Rcd 1634 (1995); *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Co. of Missouri, Inc.*, 4 FCC Rcd 8338, 8340-41 (1989).

has steadfastly refused to entertain such “collection actions” against subscribers under § 208(a).⁴⁰ The Commission’s refusal to hear such complaints is so well-established that it is referred to as the “collection action” doctrine.⁴¹

Courts have recognized that the Commission “does not entertain actions for unpaid tariffed charges.” *Qwest Services Corp. v. FCC*, 509 F.3d 531, 537 (D.C. Cir. 2007). Because of the Commission’s lack of jurisdiction to act as a “collection agent for carriers with respect to unpaid tariffed charges,” the court in *AT&T Co. v. The Peoples Network, Inc.*, 1993 WL 248165 (D.N.J.1993) effectively stayed an action to prevent injustice to AT&T, because “AT&T’s only recourse against TPN is in an action in contract to compel payment of the unpaid charges in this court. Complete relief cannot be afforded before the FCC, which simply lacks the collection remedies for AT&T which this court provides.”⁴²

Expressly relying on decisions of the courts in *MCI* and *AT&T*, as well as its own long-standing precedent, the Commission held that, under §§ 206-209 of the Act, it cannot entertain a complaint for unpaid tariffed access charges and that “such claims should be filed in appropriate state or federal courts.” *U.S. TelePacific*, 19 FCC Rcd at 24555. With respect to “an action for the recovery of unpaid access charges allegedly due under the terms of a federal tariff,” the Commission declared that “[t]he proper forum for such a dispute is the federal district court.” *Id.* Because the “collection action was not properly brought before [it] in the first instance,” the

⁴⁰ See *Contel of the South*, 23 FCC Rcd at 555-56; *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, 22 FCC Rcd 17973, 17984-85 (2007), reconsideration granted on other grounds, 23 FCC Rcd 1615 (2008); *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552, 24555-56 (2004); *America’s Choice Communications, Inc. v. LCI International Telecom Corp.*, 11 FCC Rcd 22494, 22504 (Com. Car. Bur. 1996).

⁴¹ *MAP Mobile Communications, Inc. v. Illinois Bell Telephone Co.*, 24 FCC Rcd 5582, 5595 n.102 (Enf. Bur. 2009).

⁴² *AT&T*, 1993 WL 248165, at *15.

Commission held that the filing of the complaint did not “deprive the District Court of jurisdiction over this action.” *Id.* at 24556.

III. THE COMMISSION LACKS JURISDICTION OVER BEEHIVE’S CLAIM AGAINST SPRINT FOR UNPAID TARIFFED CHARGES

Beehive’s first complaint to the Court was for the recovery of \$929,626 in access charges, plus interest and late fees, allegedly due it from Sprint under the terms of NECA 5. Beehive’s suit was indisputably a collection action in which Sprint was being sued in its capacity as Beehive’s customer. Consequently, it would be an exercise in futility for Beehive to recast its collection action as a § 208(a) complaint and file it with the Commission. The Commission would dismiss the complaint for want of jurisdiction because: (1) an alleged failure to pay access charges due under NECA 5 does not state a cause of action under the Act, *see Illinois Bell*, 4 FCC Rcd at 5270; (2) Beehive cannot bring a § 208(a) complaint against Sprint in its capacity as a customer, *id.* at 7760; and (3) the Commission is without authority to act as a collection agent for Beehive with respect to unpaid tariffed charges. *See, e.g., U.S. TelePacific*, 19 FCC Rcd at 24555.

The result would have been the same had the Commission reached Beehive’s informal complaint for declaratory relief and treated the complaint as did the Court. The Commission dismisses complaints without prejudice that purport to allege a violation of § 201(b) of the Act, but in fact stated “an action for recovery of unpaid access charges.” *Contel of the South*, 23 FCC Rcd at 555; *U.S. TelePacific*, 19 FCC Rcd at 24555. Had it read Beehive’s informal complaint for declaratory relief to be equivalent to a claim to recover unpaid tariffed charges, the Commission would have dismissed the informal complaint for want of jurisdiction. *See U.S. TelePacific*, 19 FCC Rcd at 24555 & n.26. The Commission simply lacks concurrent jurisdiction over carrier claims that effectively seek to collect unpaid access charges.

IV. BEEHIVE'S INFORMAL COMPLAINT FOR DECLARATORY
RELIEF DID NOT STATE A CLAIM FOR DAMAGES

The relief sought by Beehive's informal complaint was to have the Commission issue a declaratory ruling that:

(1) by refusing to pay access service charges solely because of alleged access stimulation, Sprint Nextel engaged in prohibited self-help practices in violation of its payment obligations under the NECA tariff and § 201(b) of the Act; and (2) by failing to pursue its access stimulation claims as required by [*Establishing Just and Reasonable Rates for LECs*, 22 FCC Rcd 11629 (WCB 2007) ("*Declaratory Ruling*")], Sprint Nextel is barred by the filed-rate doctrine from asserting those claims to challenge the lawfulness of Beehive's charges in any judicial forum.⁴³

The Commission clearly had jurisdiction to issue a declaratory ruling pursuant to § 5(d) of the APA. *See* 5 U.S.C. § 554(e). *See also* 47 C.F.R. § 1.2. It also had the authority to declare that a failure to pay compensation in certain circumstances would be an unreasonable practice under § 201(b). *See Global Crossing*, 550 U.S. at 521 (the Commission's finding that the failure to follow an order to compensate a payphone operator was an unreasonable practice under § 201(b) was "well within its authority"). Beehive invoked Commission's jurisdiction under the APA to provide declaratory relief, not its jurisdiction to award damages under §§ 206-209 of the Act.

Beehive's informal complaint did not include a prayer for damages. To the contrary, it included an express and explicit disclaimer with respect to damages.⁴⁴ In effect, Beehive asked the Commission for a declaratory ruling on the issue of Sprint's liability under § 201(b), which is clearly not the same as asking for an award of damages. Thus, in *Long Distance/USA*, the Common Carrier Bureau held:

⁴³ Letter from Russell D. Lukas to Suzanne M. Tetreault, File no. EB-08-MDIC-0029, at 5 (May 15, 2008).

⁴⁴ *See supra* note 6 and accompanying text.

[Section 207] of the Act is clearly intended to prevent parties from litigating the same issue in separate forums. In the instant proceeding, the complainants are not attempting to pursue identical issues both here and in court. Instead, they are asking us to determine the issue of liability and the court to determine the issue of damages. We see no inconsistency with [§] 207.⁴⁵

Had the Commission issued the declaratory ruling that Sprint had engaged in an unreasonable practice in violation of § 201(b), Beehive would have faced an election of remedies. It could have elected to seek redress for Sprint's violation of § 201(b) of the Act by suing Sprint for damages in federal district court under § 207. Or it could have filed a formal complaint with the Commission under § 208(a) for compensatory and consequential damages. *See Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co.*, 17 FCC Rcd 24201, 24213-21(2002). Beehive did not face an election of remedies, because the Commission did not provide the declaratory relief Beehive sought.

V. BEEHIVE'S INFORMAL COMPLAINT AND ITS COURT CASE SOUGHT DIFFERENT REMEDIES, PRESENTED DIFFERENT CLAIMS, AND RAISED DIFFERENT ISSUES

A. Beehive Pursued Different Claims and Remedies

Setting aside the absence of concurrent jurisdiction, Beehive must have made the same claim and sought the same remedy in its informal complaint to the Commission and its subsequent complaint to the Court for the § 207 election of remedies to have come into play. *See RCA Global*, 521 F. Supp. at 1005-06. In other words, only those claims and remedies sought by Beehive in its informal complaint could be barred from being brought in the Court.⁴⁶ However, Beehive's collection suit against Sprint did not duplicate its informal complaint against Sprint.

Recall that the word "remedy" is defined as the legal means of enforcing a right or redressing a wrong. Before the Court, Beehive attempted to *enforce its right* under NECA 5 to

⁴⁵ *Long Distance/USA*, 7 FCC Rcd at 410 n.30.

⁴⁶ *See supra* note 36.

recover its deemed lawful charges for providing interstate access service to Sprint.⁴⁷ In contrast, Beehive's informal complaint to the Commission was to *redress a wrong* — Sprint's alleged violation of § 201(b) of the Act. As recognized under § 415 of the Act, there is a material difference between Beehive's two claims. Beehive's law suit against Sprint was for the "[r]ecovery of charges." 47 U.S.C. § 415(a). If it had been pursued, Beehive's informal complaint against Sprint Nextel would have been for the "recovery of damages." *Id.* § 415(b). The fact that Beehive's two claims were subject to different limitations periods shows that they were separate and distinct causes of action.

Beehive's action at law before the Court was to enforce its right under § 2.4.1 of NECA 5 to collect its interstate access charges from Sprint.⁴⁸ The remedy that Beehive pursued in its collection suit was to recover \$929,626 in access charges, plus interest and late fees. Because Beehive's claim for unpaid tariffed charges was based on NECA 5, its cause of action arose under federal law, *see Graham*, 7 F.3d at 479-80, or a statute that regulates commerce, *see AT&T*, 83 F.3d at 552, or both. *See Western Union*, 41 F.3d at 1497. But Beehive's cause of action did not arise from anything done by Sprint that is "prohibited or declared to be unlawful"

⁴⁷ Because NECA's annual tariff filings have been made on a streamlined basis under § 204(a)(3) of the Act, and allowed to go into effect without suspension by the Commission, the NECA 5 rates for switched access service are "deemed lawful," 47 U.S.C. § 204(a)(3), and "conclusively presumed" to be lawful for the period they remain in effect. *See Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006); *ACS of Anchorage, Inc. v. FCC*, 202 F.3d 403, 411 (D.C. Cir. 2002); *Implementation of § 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2182 (1997), *reconsideration denied*, 17 FCC Rcd 17040 (2002). It must be noted that Sprint refused to pay *all* of Beehive's access charges, even those that it admitted were unrelated to any alleged "access stimulation" and were legitimately charged by Beehive under NECA 5.

⁴⁸ Federal law is clear that a carrier has the right to collect its tariffed charges even when those charges are in dispute. *See Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 903 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8th Cir. 2006), *cert. denied*, 550 U.S. 935 (2007); *Communique Telecommunications, Inc. d/b/a Logically*, 10 FCC Rcd 10399, 10405 (Com. Car. Bur. 1995); *Tel-Central of Jefferson City, Missouri, Inc.*, 4 FCC Rcd 8338, 8339 (1989).